IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3499 OF 2006

Chetan Taxman Khambala & Ors. .. Applicants
Versus
State of Maharashtra & Ors. .. Respondent

Mr.A.P.Mundargi, Senior Advocate with Pramod Kuthane for applicants
Mr.R.Y.Mirza, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 22nd Sepetmber 2006

P.C.

. Application is for anticipatory bail.

2. The circumstances are some what unusual. The applicants were apprehending arrest because after registering F.I.R. at their instance with regard to a dacoity committed by the accused under the garb of entering premises as C.B.I. officer. One of the accused in turn alleges

offences punishable under section 307, 324, 326 and 504 of I.P.C. The police machinery finds that the complainant has lodged a false complaint. Accordingly, it does not take any note of the same and leaves it to the complainant to take out appropriate proceedings. Rather, an entry is made that the complaint does not appear to be genuine and bonafide. Be that as it may, the complainant proceeds to file a private complaint. He invokes jurisdiction of the learned Magistrate and a direction is issued under section 156(3) of Cr.P.C. The police investigates into the complaint lodged against the applicants and submits a report as above. It appears that the learned Magistrate, thereafter, issues process on 18th April 2006. The process is issued against the applicants and other accused but it is not issued against Accused Nos. 7 to 9.

3. The submission of Mr.Mundargi, learned

Senior Counsel appearing for the applicants is that the applicants, thereafter, approached the learned Sessions Judge with a serious grievance that process being issued against the applicants alleging commission of serious offences punishable under sections 307 and 326 I.P.C. they may be taken into custody. Considering the fact that the learned Magistrate has proceeded to issue process, there was apprehension which was bonafide and genuine and it was expressly contended that the complaint is malafide. The learned Sessions Judge accepted this plea prima facie and granted interim anticipatory bail on 24th May 2006.

4. Mr.Mundargi submits that the Magistrate thereafter remanded the applicants, upon production before him to magisterial custody till 7th June 2006. Mr.Mundargi makes a serious grievance that all this was done in the teeth of an anticipatory bail order and having noticed the

same, the learned Magistrate thereafter orders release of applicants.

5. Mr.Mundargi submits that when the application for anticipatory bail was placed before the learned Sessions Judge, the learned Judge despite the above holds that there is no apprehension of arrest and the application is, therefore, not maintainable, yet, the Magistrate having issued process and in the opinion of Sessions Judge, the offences alleged being serious, custodial interrogation is necessary. The learned Sessions Judge, according to Mr.Mundargi was in error in making the observations in paras 9 and 10 of the order delivered on 15th September 2006.

6. Mr.Mundargi submits that despite observing that there is no apprehension of arrest and yet rejecting the application that the applicants are constrained to approach this court

for pre-arrest bail.

7. Mr.Mirza, A.P.P. after taking instructions makes a statement that the investigating machinery had not sought police custody remand. They had in fact recorded that the complaint was not worthy of being taken cognisance of and investigated further.

8. To my mind, once the investigating machinery had recorded as above, even if the learned Magistrate was of the opinion that the private complaint discloses commission of offences and orders investigation. It is clear that the applicants are themselves complainants and have alleged commission of offence of dacoity. The C.R. is registered at their instance. One of the applicant was taking treatment in the hospital on account of injuries caused during the dacoity. In such circumstances, entertaining an

application/complaint at the instance of one of the accused issuing process thereon that the Sessions court was approached and it was expected that it acts with care and caution. The learned Sessions Judge had protected the applicants, yet, they being remanded to magisterial custody is something which should have been taken note of by him while deciding the Anticipatory bail application. Time and again the Supreme Court has emphasised the fact that liberty of an individual is precious and ought not be tinkered with casually and lightly. The applicants have a remedy of applying for pre-arrest bail and that being provided by law and availed of, in the facts and circumstances of this case the Sessions Court should have applied its mind to the above aspects. More so, when, after the application is taken on file and interim protection is granted, thereafter, not deciding the same in accordance with law and discussing unnecessary and academic issues, raises serious doubt about the manner in

which such applications are decided by the Courts below.

9. The learned Sessions Judge after having seen the manner in which the learned Magistrate has proceeded in the matter, should not have confirmed the order of issuance of process indirectly. There was no occasion to observe anything about the pending proceedings. There was no custodial interrogation sought and yet, the learned Sessions Judge has proceeded to observe that custodial interrogation is necessary. Merely because the offences are non bailable and cognisable does not mean that the order of issuance of process makes it incumbent upon learned Sessions Judge to reject the application for anticipatory bail. The applicants were apprehending their arrest after the experience before the learned Magistrate. Learned Sessions Judge has not said a word about Whether any offences are disclosed and whether

ingredients of section 438 Cr.P.C. as applicable in this State are satisfied. In these circumstances, there is much substance in the contention of Mr.Mundargi that the application for anticipatory bail should not have been rejected in this manner by the learned Additional Sessions Judge, Pune.

10. Once the learned Judge was convinced that there was no custodial interrogation sought and, therefore, no apprehension of arrest, then the application could have been disposed of by one line order confirming interim anticipatory bail or by recording statement of prosecution that in the event they desire interrogating the applicants, they would give prior opportunity to apply in future. In any event, such orders and directions as are necessary to protect liberty of the applicants and at the same time not obstructing the course of law, could have always been passed. After observing that there is no

apprehension of arrest, the learned Judge could not have rejected the application on the ground that custodial interrogation is necessary. More so, in the facts and circumstances of the present case.

11. I have satisfied myself from a reading of the application and the annexures thereto that there is substance in the contention of the applicants that as a counter blast to their F.I.R. the instant complaint came to be lodged. The same appears to be prima facie, malafide. In such circumstances, the ingredients of section 438 of Cr.P.C. are satisfied. The applicants deserve pre-arrest bail.

12. In the passing, it is necessary to invite the attention of the courts below to the settled principles for pre-arrest bail, more so, in the context of the frequent and often noticed impression in the minds of courts below about

their power under this provision. In the case of Bharat Chaudhary and Anr. Vs. State of Bihar and Anr., reported in A.I.R. 2003 S.C. 4662, the Supreme Court has observed that anticipatory bail can be granted even when cognisance is taken or charge sheet is filed and depending upon the facts and circumstances of each case, power to grant pre-arrest bail has to be exercised. The courts below ought to be aware that the word "custody" as appearing in the provisions pertaining to bail have also been interpreted by the Supreme Court in a subsequent decision. The Supreme Court in a decision reported in A.I.R. 2005 S.C. 498(Sunita Devi Vs. State of Bihar and Anr) observes thus:-

> "15. The crucial question is when a person is in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police

or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold to an officer with coercive power is in custody for the purpose of section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court and the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken minological dubieties are unfair evasions of the

straightforwardness of the law.

"16. Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in setting in which it is used and the provisions contained in Section 437 which relates to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterised as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate.

There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate."

21. For making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in Salauddin’s case (supra), the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

22. If the protective umbrella of

Section 438 is extended beyond what was laid down in Salauddin's case (supra) the result would be clear bypassing of what is mandated in section 439 regarding custody. In other words, till the applicant avails remedies upto higher courts, the requirements of section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

23. These aspects were recently highlighted in Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Anr. (JT 2004 (7) S.C. 161). Therefore, the order of the High Court granting unconditional protection is clearly untenable and is set aside. However, the petitioner is granted a month's time from today to apply for regular bail after surrendering to custody before the concerned Court which shall deal with the

application in accordance with law. We express no opinion about the merits of the case."

13. In my view, the courts below has completely overlooked this aspect of the matter and, therefore, the order is even otherwise vitiated. Hence following order:-

i) In the event of the arrest of the applicants (1) Chetan Laxman Khambala and (2) Pradeep Tulsidas Rugani, in connection with C.R.No.RCC No.241 of 2005 on the file of Ld.J.M.F.C., Vadgaon, Maval the applicants shall be enlarged on bail in the sum of Rs.15,000/- each with one or two sureties in the like amount.

ii) The bail is granted subject to condition that the applicant will attend the Talegaon Dabhade police station as

and when summoned.

iii) Bail is granted subject to condition that the applicants shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of accusation against them so as to dissuade him from disclosing such facts to the Court or to the police officer/ investigating agency. The applicants shall not tamper with the prosecution evidence.

iv) Any observation made in this order shall not be construed as any finding or any expression of opinion on the merits of the case at the time of trial

v) This order will enure to the

benefit of the applicants only till charge sheet is filed. Thereafter, he will be free to apply to the appropriate court for appropriate relief.

vi) Application is disposed of in above terms.

vii) The parties to act upon an authenticated copy of this order.

(S.C.DHARMADHIKARI, J)